U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

Honorable Pete Wilson
Chairman, Subcommittee on Manpower and
Personnel Services
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter expresses the views of the Department of Justice concerning S. 1301, a bill to strengthen the counterintelligence capabilities of the Department of Defense, to amend the Uniform Code of Military Justice to establish penalties for espionage in peacetime, and to provide increased penalties for espionage under the criminal code.

We appreciate the interest your Subcommittee has taken in this very serious matter. As you know, the Department of Justice believes that legislation that would permit the imposition of the death penalty for persons convicted of espionage is both necessary and appropriate. The inability of our courts to impose the death penalty for an espionage violation, no matter how grave the damage to our national security, bespeaks the vital need for this legislation.

Although, we are unable to support Sections 7 and 8 of S. 1301, which would require the imposition of a mandatory sentence of life imprisonment or death for persons convicted of committing espionage on behalf of the Soviet Union, or any other communist country, because these provisions pose serious constitutional and policy questions, we would welcome the opportunity to work with members of your staff to formulate provisions for espionage offenders that meet constitutional requirements.

These requirements were delineated by the Supreme Court in a series of cases beginning with Furman v. Georgia, 408 U.S. 238 (1972), and including Gregg v. Georgia, 428 U.S. 153 (1976),

Woodson v. North Carolina, 428 U.S. 280 (1976), Coker v. Georgia, 433 U.S. 584 (1977), Lockett v. Ohio, 438 U.S. 586 (1978), Godfrey v. Georgia, 446 U.S. 420 (1980), Enmund v. Florida, 458 U.S. 782 (1982), and Stebbing v. Maryland, 105 S. Ct. 276 (1984).

Under the standards set forth in these cases, the death penalty can be imposed only if procedural safeguards have been adopted to ensure against arbitrary or inconsistent infliction of capital punishment, and the penalty is not disproportionate to the particular offense. A statute that permits the imposition of the death penalty must require the sentencing authority to consider aggravating factors that are clearly set forth in the statute, and all mitigating factors, such as the character of the defendant and any circumstances of the offense which justify a sentence less severe than death. We have serious doubts as to whether Sections 7 and 8 of the bill meet these standards.

We are also concerned that S. 1301 would preclude the imposition of the death penalty for persons convicted of espionage on behalf of a non-communist country, such as Libya or Iran. The Espionage Act, 18 U.S.C. § 794, currently authorizes capital punishment for convicted espionage offenders regardless of whether or not the foreign government involved is communist, and it is foreseeable that, at some point in the future, espionage committed on behalf of a non-communist country could constitute a sufficiently egregious offense to justify imposition of the death penalty.

Finally, Sections 7 and 8 also concern us because they would impose a mandatory minimum penalty of life imprisonment, without chance of probation, suspension of sentence, or parole, for persons convicted of espionage. We believe that this provision is not in the best interest of the nation, because it would lessen the probability that espionage defendants will plead not guilty, and waive their right to a public trial. Espionage trials are troublesome because they sometimes require the Government to disclose publicly additional sensitive national defense information, beyond that disclosed by the defendant, in order to obtain a conviction.

Our experience demonstrates that when confronted with the choice of pleading guilty to Section 794, which permits the court to impose a sentence of any term of years up to and including life imprisonment, or going to trial and facing fairly certain conviction and the likelihood of a lengthy sentence, espionage offenders often choose to plead guilty and cooperate with the Government by providing full details of their espionage activities, perhaps with the hope that their cooperation will induce the court to impose a lighter sentence. Full cooperation assists the Government by permitting our intelligence agencies to gauge more

accurately the harm done to the national security, so that appropriate countermeasures can be undertaken. Although courts take such cooperation into consideration in their sentencing determination, they are mindful of the gravity of an espionage offense, and espionage offenders are not necessarily assured that a guilty plea will result in a light sentence: of the five life sentences that have been imposed for violations of Section 794 since 1975, three were imposed on offenders who entered a plea of guilty.

Further, the imposition of a mandatory life imprisonment or death sentence is inconsistent with the Comprehensive Crime Control Act of 1984. Chapter II of the Act contains the Sentencing Reform Act of 1984, which requires a court to consider, in determining a particular sentence, the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the seriousness of the crime and other appropriate factors. See 18 U.S.C. § 3533.

Section 5 of S. 1301 would permit the uniformed services to try peacetime espionage offenders by general courts-martial. The Department of Justice supports this provision, if it is amended to address the following concerns. First, we believe that the provisions concerning mandatory sentencing for espionage on behalf of communist countries should be deleted for the reasons stated above, and that careful scrutiny should be applied to a discretionary death penalty provision for peacetime espionage to ensure that it meets constitutional standards.

Second, the phrase "who at any time" should be deleted from the first sentence of proposed Article 106a, because it is ambiguous. It could be read to suggest that persons who are subject to the Uniform Code of Military Justice could be tried by courts-martial for violations committed prior to their enlistment in the military, or, possibly, that person who committed espionage after they left military service could be tried by courts-martial for such offenses. If the intent of this phrase is to make the section applicable in peacetime, Section 5 should state so explicitly.

Third, Section 5 provides that persons charged with peacetime espionage "shall be tried" by a general court-martial. Currently, espionage offenses committed by members of the uniformed services may be prosecuted by either the Department of Justice or the Department of Defense. Because this phraseology could be construed to vest exclusive jurisdiction with the military justice system when the offender is a member of the military, and there is no apparent intent to do so, or reason for doing so, we recommend that this phrase be amended to read "may be tried by a general court-martial."

We believe that Section 6 of the bill, which would require the Department of Defense to use polygraph examinations to assist in the determination of the suitability of persons who are given access to sensitive compartmented information, and would permit that Department to use polygraph examinations to assist in determining who should be given access to all other classified information, is deficient in several regards.

First, the results of polygraph examinations of persons who are required to submit to the examinations because of their access to sensitive compartmented information could not be used against them in criminal proceedings, because the Fifth Amendment guarantees freedom from compelled self-incrimination. Second, Section 6 fails to specify the circumstances under which the results may be disseminated, or to provide safeguards with respect to unreliable polygraph results. Third, although it states that the results of the polygraph shall not be used as the sole basis for denying access to classified information, it fails to address the weight to be given to adverse polygraph results in a security clearance determination. We believe that a simple provision that required the Secretary of Defense to issue regulations which provide for utilization of a limited polygraph examination, where appropriate, as a condition of access to classified information, would meet the objectives of the bill and would permit the resolution of problems such as those outlined above.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
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